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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 BRANDI H.,

9 Plaintiff,

10 v.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

CASE NO. C19-5776 BAT

**ORDER REVERSING THE
COMMISSIONER'S DECISION AND
REMANDING FOR FURTHER
PROCEEDINGS**

13 Plaintiff appeals the denial of her application for benefits, contending the ALJ erred by
14 rejecting her testimony, a lay witness statement, and two medical sources' opinions. Dkt. 8. As
15 discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the
16 matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

17 **THE ALJ'S DECISION**

18 The ALJ found Plaintiff had the severe impairments of obesity, and mental health
19 disorders of depression, anxiety, post-traumatic stress, and methamphetamine use (in remission).
20 Dkt. 6, Admin. Record (Tr.) 18. The ALJ found Plaintiff was able to perform medium work,
21 limited to simple, routine, repetitive tasks and simple work-related decisions. Tr. 21. Although
22 Plaintiff had no past relevant work, the ALJ concluded she could perform jobs that existed in
23 significant numbers in the national economy and thus was not disabled. Tr. 25-26.

1 **DISCUSSION**

2 This Court may set aside the Commissioner’s denial of Social Security benefits only if
3 the ALJ’s decision is based on legal error or not supported by substantial evidence in the record
4 as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017).

5 **A. Plaintiff’s Testimony**

6 At a June 2018 hearing, Plaintiff testified she can stand or walk for 15 minutes and then
7 must sit for 15 minutes. Tr. 50-51. Although walking is painful, she must walk to avoid
8 stiffness. Tr. 49-50. Plaintiff must prop her feet and ankles up above her head twice a day for 30
9 to 45 minutes. Tr. 55. She can lift 7 pounds. Tr. 57. Plaintiff testified she lacks enough focus
10 to read a book or watch a movie. Tr. 57. She avoids places with a lot of people. Tr. 58.
11 Plaintiff has difficulty around crowds, but also has difficulty being alone without a familiar
12 person. Tr. 48-49. She has panic attacks every month or two that usually last 15 to 20 minutes.
13 Tr. 59, 48.

14 The ALJ could only discount Plaintiff’s testimony for “specific, clear, and convincing”
15 reasons supported by substantial evidence. *Trevizo*, 871 F.3d at 678. The ALJ discounted
16 Plaintiff’s testimony as inconsistent with her poor work history, lack of supporting objective
17 evidence, daily activities, and improvement with medication. Tr. 22-23.

18 **1. Work History**

19 In a disability report, Plaintiff stated she stopped working in 2008 due to her conditions.
20 Tr. 301. The ALJ found Plaintiff had a poor work history even before 2008 as well as a history
21 of drug abuse, and concluded her poor work history was related to substance use. Tr. 22. This
22 work history has very little relevance to evaluating Plaintiff’s testimony, however. The ALJ
23 accepted Plaintiff’s testimony she has not used drugs since her May 2016 alleged onset date. *See*

Tr. 21. Whether drug use affected her work history before 2008 has little bearing on the reliability of her 2018 hearing testimony. Work history was not a clear and convincing reason to discount Plaintiff's testimony.

2. Objective Evidence

Lack of supporting objective evidence cannot, by itself, constitute clear and convincing reason to discount a claimant's testimony. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). "Contradiction with the medical record is a sufficient basis for rejecting a claimant's subjective testimony," however. *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008). Regarding physical impairments, the ALJ cited only a lack of clinical observations of pain behavior, atrophy, or difficulty moving, but identified no contradictory medical evidence. Regarding mental impairments, an examining psychologist found Plaintiff had normal concentration. Tr 380, 554. This is reason to discount testimony of impaired concentration, but not other testimony. *See* Social Security Ruling 16-3p, 2017 WL 5180304 at *8 (S.S.A. 2017) (ALJ must explain "*which* of an individual's symptoms" was inconsistent with evidence (emphasis added)). It does not contradict testimony of avoiding crowds, for example.

3. Activities

An ALJ may discount a claimant's testimony based on daily activities that either contradict her testimony or that meet the threshold for transferable work skills. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). The ALJ cited walking a lot, including as a form of transportation. Tr. 22, 23. On one occasion Plaintiff walked to her physical therapy appointment without an increase in symptoms but, on another occasion, it increased her pain. Tr. 438, 439. None of this contradicted Plaintiff's testimony of walking 15 minutes and then sitting 15 minutes throughout the day, and that walking hurts but is required to prevent stiffness.

1 Other activities the ALJ cited also did not meet the clear and convincing standard. Tr.
2 23. The ALJ cited moving her camp and belongings when homeless. But there is no evidence
3 such belongings weigh more than the 7 pounds Plaintiff testified she can lift or that she moves
4 them all at once. The ALJ cited unspecified housework but did not explain how it contradicted
5 Plaintiff's testimony. The ALJ cited laundry, but again did not show any contradiction. The
6 ALJ cited Plaintiff's statement, when she was homeless, of taking "1-2 hours" daily to prepare
7 meals because "it takes longer" than before her impairments began. Tr. 323. This suggests she
8 lacks the focus to perform simple tasks, not that she has the focus to create elaborate meals.
9 Plaintiff shops, but only when the store is nearly empty. Tr. 58. The ALJ found going to a park
10 "suggests an ability to function outside of the home," but Plaintiff was homeless at the time and
11 thus had no choice but to be "outside of the home." Tr. 23. Making one friend in her building
12 after several months does not contradict Plaintiff's testimony that she avoids crowds. Tr. 503,
13 501; Tr. 321 ("anxiety around too many people or new people").

14 Plaintiff's activities were not a clear and convincing reason to discount her testimony.

15 **4. Improvement with Medication**

16 Impairments that can be "controlled effectively" by medication or treatment are not
17 considered disabling for purposes of determining eligibility for Social Security benefits. *See*
18 *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). However, "doing
19 well for the purposes of a treatment program has no necessary relation to a claimant's ability to
20 work or to her work-related functional capacity.'" *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th
21 Cir. 2014) (quoting *Hutsell v. Massanari*, 259 F.3d 707, 712 (8th Cir. 2001)). Evidence that
22 medical treatment helped a claimant "return to a level of function close to the level of function
23 they had before they developed symptoms or signs of their mental disorders' ... can undermine a

1 claim of disability.” *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017) (quoting 20
2 C.F.R. Pt. 404, Subpt. P, App’x 1, § 12.00H (2014)).

3 The reasons the ALJ provided were not well supported by the record and, moreover, do
4 not contradict Plaintiff’s testimony or show she can work. The ALJ found Plaintiff’s medication
5 changed infrequently and concluded “her symptoms were relatively stable with treatment.” Tr.
6 23. But medication changes were discussed in all five cited medication management
7 appointments between October 2016 and October 2017 and were implemented in four of the five
8 visits. Tr. 482-84, 495-97, 510-12, 527-29, 543. Medication was increased, decreased due to
9 side effects, or changed. This does not indicate Plaintiff’s condition was stable.

10 The ALJ accepted Plaintiff’s testimony of medication reducing her panic attacks from
11 “every two weeks to only four in six months.” *Id.*; Tr. 48. This improvement does not contradict
12 Plaintiff’s testimony; Plaintiff does not claim panic attacks alone are disabling.

13 The ALJ also found Plaintiff’s limitations were in part due to situational stressors, which
14 “improved somewhat when she obtained housing.” Tr. 22-23 (citing Tr. 501, 518, 526). A
15 treatment note showed Plaintiff “doing better now that she is housed” but even after several
16 months Plaintiff struggled with living alone and even sleeping inside her apartment. Tr. 526; Tr.
17 501, 518. This does not contradict Plaintiff’s testimony or show she could work.

18 The ALJ found the evidence of improvement with medication, “considered with the
19 observations of normal mood, affect, and behavior,” contradicted Plaintiff’s testimony. Tr. 23.
20 The ALJ cited one gynecological treatment note mentioning “normal mood and affect.” Tr. 557.
21 This single note contrasts with regular observations of abnormal mood and affect by Plaintiff’s
22 mental health providers and is not sufficient to contradict Plaintiff’s testimony or show she
23 improved to a level where she could work. *See* Tr. 482, 485-86, 488, 494-95, 498, 500, 502,

1 504, 509, 515, 523-25, 530-32, 537-40, 542. Improvement with medication was not a clear and
2 convincing reason to discount Plaintiff's testimony.

3 The Court concludes the ALJ harmfully erred by discounting Plaintiff's testimony
4 without providing a clear and convincing reason.

5 **B. Examining Psychologists' Medical Opinions**

6 Wendy Hartinger, Psy.D., examined Plaintiff in April 2015. Tr. 372. Peter A. Weiss,
7 Ph.D., examined Plaintiff in March 2016 and February 2018. Tr. 376, 550. Both doctors filled
8 out psychological evaluation forms, opining Plaintiff had marked or severe limitations in
9 completing a normal work day and work week without interruptions from psychologically based
10 symptoms and in maintaining punctual attendance. Tr. 374, 378, 552.

11 An ALJ may only reject the contradicted opinion of an examining doctor by giving
12 "specific and legitimate" reasons. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017). The
13 ALJ discounted the opinions as unsupported or contradicted by objective evidence and overly
14 reliant on Plaintiff's unreliable self-reports. Tr. 24. However, the ALJ erred in discounting
15 Plaintiff's self-reports and thus erred in discounting medical opinions for reliance on them. The
16 ALJ also discounted the opinions as inconsistent with "evidence of stable mental symptoms,
17 notably the relatively few changes that were made to her psychiatric medications." Tr. 24. But
18 the ALJ's finding of few medication changes was not supported by the record. The remaining
19 reason of conflict with objective evidence is addressed separately for each doctor.

20 **1. Peter A. Weiss, Ph.D.**

21 Dr. Weiss' mental status examination results document normal memory and
22 concentration. Tr. 380, 554. The ALJ found this inconsistent with opined limitations in
23 "sustained concentration and persistence." Tr. 24. But Dr. Weiss opined severe or marked

1 limitations in the ability to “perform activities within a schedule, maintain regular attendance,
2 and be punctual within customary tolerances without special supervision” and the ability to
3 “complete a normal work day and work week without interruptions from psychologically based
4 symptoms.” Tr. 378, 552. These limitations are not necessarily related to concentration and
5 persistence; Dr. Weiss opined only mild or no limitations on the ability to “persist” in simple
6 tasks. *Id.* Other reasons, such as debilitating depression, may cause difficulty adhering to a
7 normal work schedule. Contradiction with his own findings was not a specific and legitimate
8 reason to discount Dr. Weiss’ opinions. The Court concludes the ALJ erred in discounting them.

9 **2. Wendy HTrtinger, Psy.D.**

10 Only part of a mental status examination was attached to Dr. Hartinger’s report. *See* Tr.
11 375. This portion showed normal speech and attitude/behavior and abnormal appearance, mood,
12 and affect. *Id.* Comparing Dr. Weiss’ forms, the missing information should have addressed
13 thought process and content, orientation, perception, memory, fund of knowledge, concentration,
14 abstract thought, and insight and judgment. *Cf.* Tr. 380. Because this case must be remanded for
15 reconsideration of Plaintiff’s testimony and Dr. Weiss’ opinions, the ALJ will have the
16 opportunity to develop the record by seeking the remainder of Dr. Hartinger’s mental status
17 examination results. The Court need not address whether the apparent scrivener’s error of failing
18 to attach the full results is an adequate reason to discount the opinions.

19 **C. Lay Witness Statement**

20 An ALJ may discount lay witness testimony by giving a germane reason. *Diedrich v.*
21 *Berryhill*, 874 F.3d 634, 640 (9th Cir. 2017). Plaintiff’s former boyfriend filled out a function
22 report, documenting Plaintiff’s easy distractibility and avoidance of crowds. Tr. 329-36. The
23 ALJ discounted these statements as “inconsistent with the objective evidence” and “relatively

1 stable mental symptoms.” Tr. 25. The finding of stable mental symptoms was not supported by
2 the record. Normal concentration was germane to discounting the statement of easy
3 distractibility, but the ALJ did not identify any objective evidence inconsistent with social
4 problems. The ALJ erred by discounting this portion of the lay witness statement.

5 **D. Scope of Remand**

6 Plaintiff argues the improperly disputed evidence establishes disability if credited as true,
7 and thus the Court should remand for an award of benefits. Dkt. 8 at 13-14; Dkt. 10 at 6. “This
8 is an erroneous reading of [Ninth Circuit] case law, which requires [the Court] to assess whether
9 there are outstanding issues requiring resolution *before* considering whether to hold that the
10 [improperly discredited evidence] is credible as a matter of law.” *Treichler v. Comm’r of Soc.*
11 *Sec. Admin.*, 775 F.3d 1090, 1105 (9th Cir. 2014). Dr. Weiss’ and Dr. Hartinger’s opinions
12 remain contradicted by the opinions of state agency doctors Eugene Kester, M.D., and Joshua J.
13 Boyd, Psy.D. Tr. 98-100, 113-14. The ALJ must resolve such conflicts. The Court concludes
14 remand for further administrative proceedings is proper.

15 **CONCLUSION**

16 For the foregoing reasons, the Commissioner’s decision is **REVERSED** and this case is
17 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

18 On remand, the ALJ shall reassess Plaintiff’s testimony, the lay witness statement, and
19 Dr. Weiss’ and Dr. Hartinger’s opinions; develop the record and reevaluate the RFC as
20 appropriate; and proceed to step five as needed.

21 DATED this 16th day of January, 2020.

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BRIAN A. TSUCHIDA
Chief United States Magistrate Judge